BLANK PAGE

Nos. 473, 474, 475

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 473

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
MARJORIE K. CAMPBELL

No. 474

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
SEYMOUR H. KNOX

No. 475

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
DOROTHY K. G. ROGERS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

DANIEL J. KENEFICK
JOHN L. KENEFICK
RALPH M. ANDREWS
ERNEST J. BROWN
ROBERT R. BARRETT
Counsel for Respondents

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

BLANK PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 473

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
MARJORIE K. CAMPBELL

No. 474

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
SEYMOUR H. KNOX

No. 475

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
DOROTHY K. G. ROGERS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

The respondents in the above entitled cases hereby respectfully petition this Court for rehearing and recon-

sideration of its decisions in these cases announced on March 31, 1941. Fully aware that such action by this Court is rare, they nevertheless feel that it is warranted, if not required herein, in order that the questions presented may have more careful consideration.

This petition is believed meritorious for the following reasons, summarily stated:

1. The Court's own language indicates the erroneous nature of the result reached.

2. The Court has apparently given no consideration to the majority of its own previous decisions herein relevant,[1] and has misread the one decision which it did consider.[2]

3. The Court has apparently given little consideration to the clear language of the statute, or to the statutory structure into which these decisions must somehow be fitted.

4. The Court has misread the legislative history of the statutory provisions involved.

5. While Revenue Acts are probably to be construed in the light of their predominant purpose to produce revenue, this affords little trustworthy light for the reading of statutory provisions as to cost bases, where the result, applied to varying cases, may sometimes help and as often hurt the public revenues; it certainly affords a questionable basis for decision in any given case.

---

[1] Anderson v. Wilson, 289 U. S. 20 (1933); Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496 (1936); Lyeth v. Hoey, 305 U. S. 188 (1938); Hartley v. Commissioner, 295 U. S. 216 (1935).

[2] Brewster v. Gage, 280 U. S. 327 (1930).

Argument

The fundamental question in these cases is the basis issue. With this issue decided in favor of the Commissioner, the results on the "period of holding" and "first in, first out" questions, follow automatically by virtue of the tacking provisions of Section 101(c)(8)(B) and Article 58 of Regulations 77, the validity of which was not challenged by the respondents. The Court's rather lengthy consideration of these questions in the *Gambrill, Campbell, Knox* and *Rogers* cases, after a decision in favor of the Commissioner on the "basis" issue is perhaps to be regarded somewhat as a work of supererogation, since no substantial question was presented with respect to these issues except in the event of a decision favorable to the taxpayers on the "basis" issue. We therefore confine ourselves herein to a consideration of the "basis" issue. Should the Court reconsider and reverse its decision on that question, the arguments presented in our brief on the latter questions would then become relevant and material, and, we believe, conclusive.

The Court's decision on the "basis" issue was set forth in its opinion in *Maguire v. Commissioner*, No. 346, argued immediately preceding these cases, and decided at the same time. Since the facts in all the cases, so far as they concern the "basis" issue, are analogous except as to the character of the remainders, we here deal, for the purpose of clarity, with the facts and opinion as set forth in the *Maguire* case.

A. Property Owned by the Decedent.

The Court's own statement of the basic facts and the question presented, when compared with the statute, gives

a clear answer to the question with respect to property owned by the decedent at his death. The first sentence of the Court's opinion reads: "The taxpayer's share of a testamentary trust, established pursuant to the will of her father, was delivered to her in kind in 1923." These are the essential facts, and the pertinent section of the statute, phrased in almost the same words furnishes the clear and obvious answer: "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer." That "delivery" and "distribution" as here used are synonymous has not been questioned either by the Commissioner or by the Court. Comparing the facts as stated by the Court, and the statute, the conclusion seems inescapable that value as of the time of distribution to the taxpayer, which the Court says is in 1923, shall establish the cost basis.

So it is with the Court's statement of the first question, *i. e.* "(1) whether the basis in case of the personalty owned by decedent is its value when received by the trustees from the executors or its value at the date of delivery by the trustees to the taxpayer." The statute furnishes a clear answer in words which almost echo the latter words of the Court's statement: "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."

If it were doubtful, the Court's own language makes it clear that the individual respondents here are "the taxpayers." The statute provides that in these cases basis shall be the market value of property when distributed "to the taxpayer." The Court's avoidance of the obvious and,

we believe, necessary conclusion involves a reading out of the statute of the vital last three words, "to the taxpayer."[3]

Distribution of property to the trustee is not distribution of property to the taxpayer where the taxpayer is the beneficiary of the trust. Whatever talk may be indulged in about equitable estates,[4] the fact remains that the time of distribution of property to the taxpayer is the time of distribution of property to the taxpayer, and not the time of distribution of property to some other person. Since *Anderson v. Wilson,* 289 U. S. 20 (1933), which the Court's opinion does not mention, it has never been imagined that under the scheme of the Revenue Acts a trustee and a beneficiary were the same person or the same taxpayer. So long as Congress retains the statutory scheme embodied in Supplement E (Sections 161-169) of the Revenue Acts, it seems to be required of the Courts that they shall respect the clearly stated Congressional plan to treat them as separate.

Not only does the Court's opinion remove the phrase "to the taxpayer" from the statute, it also distorts the words "property" and "distribution." When property—real estate, securities, second hand books or whatever—is sold or exchanged, the statute (Sections 22(a), 22(f) and 111) provides that gain or loss shall be recognized. That gain or loss is measured by the difference between the basis of that property established by Section 113 and the amount realized upon the sale or exchange of the same property.

---

[3] It is perhaps significant that though the government's briefs in tax cases customarily refer to the litigant opposing the Commissioner as "the taxpayer," such reference is studiously avoided in these cases.

[4] Cf. Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496 (1936).

If the beneficiary of a testamentary trust sold his remainder interest, that would produce gain or loss measured by the basis of that remainder interest. But where, as here, specific and identified securities are sold, gain or loss is measured by the basis of those securities—or so the statute provides. To treat the two—the specific property and the remainder interest—as the same, as the Court has done, can arise from, and produce nothing but, complete confusion—a confusion, we may say, which once existed and which was eliminated only after extensive administrative probing of the field. See G. C. M. 19884, 1938-1 Cum. Bull. 290, and cases cited therein[5]. The Court holds that distribution to a trustee is distribution to the taxpayer because the taxpayer then acquires an equitable estate in the property, and says that it is immaterial that legal title and possession may not be transferred to him until years later. To this there are two obvious objections in addition to those pointed out above. In the first place, "distribution" is a totally inappropriate word with reference to the coming into being of an equitable estate, and it was not an equitable estate which was here sold. The statute, in so far as it deals with property acquired by general bequest, makes vital the time when the specific property later sold was *distributed* to the taxpayer who sold it; not the time when he acquires some equitable interest. And to say, as the Court has done in support of its conclusion—and this is the second objection—that the equitable estate arises when property is transferred from executor to testamentary trustee, is at best a somewhat dubious statement.

[5] It is worth noting that the Commissioner in his Maguire brief (No. 346, p. 27) was careful to urge that the basis provisions of the statute "are concerned with the particular property sold" and to point out that the "particular property" must be carefully distinguished from "the interest or estate of which the specific property sold was a part." Thus, as to this the Court's opinion runs counter to the contentions of both parties.

Most careful students would agree that the equitable estate of the remainderman of a testamentary trust—or more accurately, his future interest—arises upon the death of the testator. Indeed, this Court itself has, rather inconsistently, twice so stated in its discussion of the succeeding issues in the *Gambrill* and *Campbell* cases. Therefore, the argument that distribution of property to the taxpayer occurs when the equitable estate in the taxpayer comes into being, proves too much. If the Court's reasoning were correct, the cost basis would be established by value at the date of death. But no one thus far has expressed—or well could express—any idea that the 1928 and 1932 Acts so provide with respect to property other than realty and personal property specifically bequeathed.

In support of its conclusion the Court summons the decision in *Brewster v. Gage*, 280 U. S. 327 (1930). But the Court's discussion of that case indicates a rather surprising unawareness of the grounds of its decision. Under the Revenue Act of 1926 and other statutes prior to the Revenue Act of 1928, it had been provided: "If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of acquisition." In *Brewster v. Gage*, a case arising under the earlier statute, the Court pointed out that real property and specific bequests were clearly acquired at the death of the decedent and should therefore take a cost basis of value at that time. It added that there was nothing to indicate that other property acquired from a decedent should be treated differently, and that Congress had presumably intended uniformity rather than diversity of treatment. It was argued by the taxpayer in *Brewster v. Gage* that the 1928 Act was—as this Court says—"designed to clarify" the earlier statutes, and that

the clear provision for diversity of treatment of real property and specific bequests on the one hand and general bequests on the other in the 1928 statute should be imputed to the earlier statutes. But in *Brewster v. Gage* the Court, referring to the 1928 statute, rejected this argument, saying, "The deliberate selection of language so differing from that used in the earlier Acts indicates that a change of law was intended." 280 U. S. 327, 337. Now the Court refers to *Brewster v. Gage* as authority for seeking a degree of pseudo-uniformity[6] under the 1928 Act in order to bring it as closely as possible within the pattern of earlier Acts. Reasoning so circuitous as this certainly deserves, if it does not require, reconsideration.

The Court's discussion of the legislative history of the 1928 statute seems equally uncomprehending. In the face of the clear dichotomy provided for in the 1928 Act, the Court minimizes the departure from the uniformity of 1926 and earlier statutes, and says that the difference between the final Senate form of the 1928 statute and the original House form was designed only to avoid confusion. "To be sure," states the opinion, "it did produce a limited deviation * * *." Regardless of purpose and

[6] It cannot be uniformity since the statute specifically provides that on the one hand real property and property acquired by specific bequest shall have a basis of value at the date of death while, on the other hand, "in all other cases . . . the basis shall be the fair market value of the property at the time of the distribution to the taxpayer." Indeed, it seems strange, in view of this clear differentiation in the statute to find this Court stating as a ground for rejection of the respondents' position, that it would produce "a substantial disparity between the treatment of remaindermen of realty and remaindermen of personalty under the same testamentary trust." Meanwhile the Court apparently finds no cause for concern with the disparity which its decision creates between remaindermen of a testamentary trust and remaindermen of inter vivos trusts of a class to which the last sentence of Section 113(a)(5) relates.

characterization, the deviation exists. The House bill provided for a uniform value-at-death rule as the basis of all property acquired by will or intestacy; the Senate bill provided the value-at-death basis only for real property and property acquired by specific bequest. "In all other cases," provided the Senate deviation which was enacted into law, "if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer." And all the taxpayers here seek is a recognition and enforcement of that statutory "deviation" giving them a cost basis in property equal to the value of the property at the time of the distribution of the property to them, the taxpayers.

B. Property Purchased by Testamentary Trustees.

The Court holds that property purchased by testamentary trustees and subsequently distributed to beneficiaries was not "property acquired by will" by the latter, and so was not subject to the provisions of Section 113(a)(5). At the same time the Court holds, as the government concedes, that property purchased by executors and distributed was "property acquired by will" and subject to Section 113(a)(5). There is no rational basis, we believe, for saying that property purchased by an executor is acquired by will and that property purchased by a testamentary trustee is not.

The Court relies upon the title of Section 113(a)(5), "Property Transmitted at Death." We have shown in our brief that this title, applied to the section in its final form, was accidental and anomalous. It was appropriate to the House bill in which it was written; it had no rele-

vance after the Senate changes were made. But even passing this clear bit of history, and taking significance from the title, the section is then as inappropriate to property purchased by executors as it is to property purchased by testamentary trustees. Neither is transmitted at death.

The Court says that the Senate report specifically stated that Section 113(a)(5) governed purchases by executors, and made no reference to purchases by testamentary trustees. Without commenting on the intimated necessity of a Committee report being encyclopedic, it must be pointed out that the Court omits the telling phrase "For example," used in the Report to illustrate the working of a statutory provision applicable "In all other cases * * *."

The Court does not mention *Lyeth v. Hoey*, 305 U. S. 188 (1938), and *Hartley v. Commissioner*, 295 U. S. 216 (1935). Yet its decision is inconsistent with the reasoning of the former. And in giving one taxpayer (beneficiary) another taxpayer's (trustee's) cost basis in property without statutory sanction, the Court substantially overrules the latter case. In reasoning from what the trustee's cost basis would have been had it sold the property, the Court indicates either unfamiliarity with the *Hartley* case or an unspoken intention to overrule it, which latter alternative can hardly be presumed. We believe that under such circumstances these cases deserve more complete consideration than the Court's opinion evidences.

C. The Statute.

In several places in its opinion the Court has stated that a decision contrary to that reached by it would open an avenue for tax avoidance. This statement, made originally

by the Commissioner, we believe we have shown in our brief to be an assumption without factual basis. Some avoidance might have been possible whatever the result of these cases, but we believe we have shown that the preponderance lies in the other direction. But if we are wrong on this, a larger question is presented.

We believe that the language of Section 113(a)(5) of the Revenue Acts of 1928 and 1932 is clear. At all events the result reached in these cases can be attained only by eliminating some of the particularly significant words and phrases which Congress chose to put into that section. Whatever the result of taking the whole section, that is what Congress enacted. And while the Courts should undoubtedly in difficult cases read the Revenue Acts in the light of their "general object to put money into the federal treasury" *(Helvering v. Stockholms Enskilda Bank,* 293 U. S. 84, 89 (1934)), that principle, if carried too far or applied as the ultimate determinant in the decision of cases, brings into play for the consideration of the Court those fundamental factors which, in another connection, were set forth by Mr. Justice Stone dissenting in *United States v. Butler,* 297 U. S. 1, 78-79 (1936).

This petition for rehearing is submitted in the firm conviction that it is meritorious, and the undersigned certify that it is presented in good faith and not for purposes of delay. If, in it, we have been frank in indicating that we believe the Court's opinion to be not well considered and logically unsupportable, those statements are made not with lack of respect for the Court, but in the belief that consistent

with our professional obligations we could in this case do no less.

Dated: April 24, 1941.

Respectfully submitted,

DANIEL J. KENEFICK
JOHN L. KENEFICK
RALPH M. ANDREWS
ERNEST J. BROWN
ROBERT R. BARRETT
Counsel for Respondents

BLANK PAGE

BLANK PAGE

SUPREME COURT OF THE UNITED STATES.

No. 472.—October Term, 1940.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
vs.
Richard Van Nest Gambrill.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 31, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

The questions involved here are in part the same as those in *Maguire* v. *Commissioner*, No. 346, decided this day. Respondent was a remainderman under a trust created by the will of his grandmother[1] who died in 1897. The trust *res*, consisting of personalty, was delivered by the executors to themselves as trustees in 1898. The life beneficiary, respondent's mother, died in March, 1928. On May 5, 1928, the trustees delivered the corpus to respondent as remainderman. Some of the property was part of the original trust *res*, and some was purchased by the trustees both prior to and subsequent to March 1, 1913. During the year 1930 (in February, on May 6, and in June) respondent sold some of the property in each group. The Board of Tax Appeals (38 B. T. A. 981) and the Circuit Court of Appeals (112 F. (2d) 530) held: (1) that for the purpose of determining gain or loss on the sale of the property in question the basis to respondent by virtue of § 113(a)(5) of the Revenue Act of 1928 (45 Stat. 791) was the fair market value of the property on the date when the corpus was

1 Respondent was the sole surviving issue of his mother, Anna Van Nest Gambrill, and took under the following provisions of his grandmother's will:

"Ninth. All the residue of my estate of every kind I give and devise as follows:

'One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jeanie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.

'The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons to wit my said three daughters and my said granddaughter and to receive the income and pay the same to her during her life with full power to invest and reinvest in their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors of the said four persons to wit my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living.'"

delivered to respondent; and (2) that the property sold in February, 1930 had not been held by the taxpayer for more than two years and was, therefore, not a capital asset within the meaning of § 101(c) of the 1928 Act, while that sold on May 6 and in June, 1930, had been held by respondent for more than two years and was therefore a capital asset.

The rulings on the first question were erroneous. For the reasons stated in *Maguire* v. *Commissioner, supra*, the basis under § 113(a)(5) for the property delivered to respondent by the testamentary trustees was its value when distributed by the executors to the trustees if the property was owned by the decedent at her death, and cost to the trustees if it was purchased by them.[2]

We also disagree with the disposition made of the second question. Capital gains or losses are defined as those resulting from sales or exchanges of capital assets. § 101(c)(1) and (2). Capital assets are defined (with exceptions not material here) as "property held by the taxpayer for more than two years." § 101(c)(8). And § 101(c)(8)(B) provides: "In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person."

We are of the view that under these provisions respondent's holding period dates from the decedent's death for property which she then owned and from the date of purchase for property purchased by the trustees. In *McFeely* v. *Commissioner*, 296 U. S. 102, this Court held that a legatee's holding period under § 101(c)(8) of the 1928 Act dated from the decedent's death for property owned by the decedent and distributed to the legatee by the

---

[2] It should, of course, be noted that § 113(b) provided:

"(b) Property acquired before March 1, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a)(1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date."

executors, in spite of the fact that the legatee's basis under § 113-(a)(5) was value at the time of distribution to him by the executors. The date of acquisition was held to be the date of death, regardless of the gap between that date and the date of distribution. And that result was reached even though some of the taxpayers involved were residuary legatees whose interests at date of death were not unconditional. The reasoning of that case plus § 101(c)(8)(B) make it plain that respondent's interest, albeit a remainder, was acquired at the date of decedent's death for property then owned and at the date of purchase for property purchased by the trustees. The continuity in his holding was not broken by the intervening trust. The formal constitution of that trust though of special significance under § 113(a)(5) (*Maguire* v. *Commissioner, supra*) did not change the basic quality of his property interest. And the fact that that interest did not ripen into full and complete ownership except by the passage of time or the occurrence of subsequent events is inconsequential. For § 101(c)(8)(B) provides, as we have seen, that in determining the taxpayer's holding period there shall be included the period for which the property was held by any other person if under § 113 the property had the same basis in whole or in part in the taxpayer's hands as it would have in the hands of the other person. It is plain that under § 113 the basis to the trustees was the same as the basis to the taxpayer. Hence the period of their holding is not to be excluded from the period of the taxpayer's holding. That makes plain that "property held by the taxpayer" as used in § 101(c)(8) embraces not only full ownership but also any interest whether vested, contingent, or conditional. Otherwise the period of the holding by trustees would not be included in the holding by a mere remainderman. Hence, as in *McFeely* v. *Commissioner, supra,* we look to the time when the taxpayer first acquired the interest which later ripened into full ownership. It is plain that for property owned by the decedent he acquired that interest at her death and that for property purchased by the trustees he acquired that interest at the date of purchase.

Reversed.

The Chief Justice and Mr. Justice Roberts think the judgment should be affirmed for the reasons stated by the court below, 112 F. (2d) 530.

BLANK PAGE

SUPREME COURT OF THE UNITED STATES.

Nos. 473, 474, 475.—October Term, 1940.

473	Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Marjorie K. Campbell.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
474	Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Seymour H. Knox.	
475	Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Dorothy K. G. Rogers.	

[March 31, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

The questions presented by these cases are in part related to, and in part the same as those involved in *Maguire* v. *Commissioner*, No. 346, and *Helvering* v. *Gambrill*, No. 472, decided this day.

The father of these respondents died in 1915. By his will it was provided that his residuary estate should be divided into four parts. One part was devised and bequeathed to trustees: "To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years and thereafter to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise, and bequeath to my said daughter, Marjorie Knox, one-half (½) of the property then constituting said trust fund and I direct my said

trustees to pay over the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever. In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs."

Marjorie Knox is respondent Marjorie K. Campbell. Another part of the residuary estate was placed in trust for respondent Dorothy K. G. Rogers, under the same terms. And a third part together with certain securities was placed in trust for respondent Seymour H. Knox, under similar terms. He, however, was to receive $500,000 of the trust fund when he reached the age of twenty-five, one-half of the remaining trust fund when he became thirty, and the balance at thirty-five. Meanwhile, the income was payable to him. On July 1, 1921, the executors, pursuant to an order of the probate court, transferred the property to the trustees.

Marjorie K. Campbell attained the age of twenty-eight on July 10, 1928, and received at that time one-half of the property of her trust. Certain of the securities which she then received were sold by her during 1933 and certain of the bonds matured and were paid during 1933. Some of those securities had been held by her father at his death, others had been purchased by the executors, and some had been purchased by the trustees. In 1926 and 1927 she purchased stock of the F. W. Woolworth Co., which with dividends received in 1927 amounted to 1000 shares. In 1928 she received delivery from the trustees of 15,000 shares of Woolworth stock which represented shares owned by her father at his death, a subsequent tax-free stock split-up, stock dividends, and purchases by the trustees. In 1929 she surrendered the 16,000 shares she owned and received tax free 40,000 shares pursuant to a split-up of the stock. In 1933 she sold 10,000 of the shares received in 1929. There is no way of identifying the shares sold with any particular shares surrendered in 1929.

Dorothy K. G. Rogers became twenty-eight on August 26, 1924, and thirty-five on August 26, 1931, at which times she received distributions of the corpus. During 1933 she sold securities so received. Some of those securities had been purchased by the trustees, some by the executors, and others had been owned by her father at his death.

Seymour H. Knox attained the age of thirty on September 1, 1928, and received on that date one-half of the corpus, including 8,575 shares of stock of Maine Share Corp., of which 5,160 were purchased by the trustees on August 31, 1927, and 3,415 were purchased by the trustees on August 30, 1928. He later exchanged those shares in a non-taxable transaction and on June 10, 1930, sold the shares received in that exchange.

The Board of Tax Appeals[1] and the Circuit Court of Appeals (112 F. (2d) 530) held: (1) that the basis to respondents under § 113(a)(5) of the Revenue Acts of 1928 and 1932[2] as respects sales made by them was the fair market value at the time when the securities were delivered to them by the trustees, no matter when or how the trustees or the executors may have obtained the securities; (2) that in determining how long respondent Knox held securities for purposes of computing the term of his holding under § 101 of the Revenue Act of 1928, the date of transfer from the trustees should govern; and (3) that as respects the sale of Woolworth stock by respondent Campbell, her own shares should be treated, under the "first-in-first-out" rule, as sold prior to those which were delivered to her by the trustees.

It follows from our holding in *Maguire* v. *Commissioner, supra*, that the rulings on the first issue were erroneous. As respects the securities owned by the decedent at death, the basis is their value when delivered by the executors to the trustees. As respects the securities purchased by the trustees, the basis is cost to the trustees. And we are of the view that as respects securities purchased by the executors the basis is the value when delivered by them to the trustees. As we said in *Maguire* v. *Commissioner, supra*, the legislative history of § 113(a)(5) clearly indicates that it applies to purchases by executors. Hence it follows from our reasoning in *Maguire* v. *Commissioner, supra*, that the date of delivery by the trustees to the

---

[1] The opinion of the Board in Helvering *v.* Campbell is reported in 39 B. T. A. 916; its opinions in the other two cases are unreported.

[2] Sec. 113(a)(5) of the 1932 Act (47 Stat. 169, 199) was the same as § 113(a)(5) of the 1928 Act (45 Stat. 791, 819).

beneficiaries is no more appropriate here than it is in case of property owned by the decedent at date of death.

We also disagree with the court below on the second issue. Some of the securities were sold by respondent Knox more than two years after they had been purchased by the trustees.[3] For the reasons stated in *Helvering* v. *Gambrill, supra,* it follows, therefore, that they had been "held" by him for more than two years within the meaning of § 101(c)(8).

We also take a different view on the third proposition. The "first-in-first-out" rule is reflected in Treasury Regulations. The general rule[4] is that where shares of stock cannot be identified with any particular lots purchased, they will be charged against the earliest purchases.[5] For the purpose of determining the earliest purchases the regulation[6] adopts the rule of tacking contained in § 101(c)(8)(B). That being true, it must be presumed that the Woolworth stock coming from the decedent's estate was first sold. The holding by the trustees is included in that of the beneficiary. Hence, as we indicated in *Helvering* v. *Gambrill, supra,* the date of acquisition by the beneficiary was the date of death. It is that date of acquisition which governs the application of the "first-in-first-out" rule. Therefore, the court below was in error in ruling that respondent Campbell's own shares were sold first.

Respondents have contended, at least in regard to some of these issues, that the nature of their remainder interests necessitates a

[3] On this phase of the cases no question is presented as to securities purchased by executors.

[4] Art. 58, Treas. Reg. 77, promulgated under the 1932 Act provides:

"Sale of stock and rights.—When shares of stock in a corporation are sold from lots purchased at different dates or at different prices and the identity of the lots cannot be determined, the stock sold shall be charged against the earliest purchases of such stock. In the determination of the earliest purchases of stock the rules prescribed in subparagraphs (A), (B), (C), and (D) of section 101(c)(8) (relating to the period for which property has been held) shall be applied. . . ."

And see Art. 600(4) dealing with stock or securities distributed in reorganization.

[5] The regulations refer only to "purchases". But no question has been raised as to their application to shares acquired under a will. In fact, the Board of Tax Appeals stated (39 B. T. A. 916, 919) that the "parties are in agreement that the first in, first out rule must be applied, since the shares which the petitioner sold can not be identified as those purchased at any particular time." Furthermore, respondent concedes here that the rule should not be limited to securities which have been bought as distinguished from those which have been otherwise obtained.

[6] Art. 58, *supra* note 4.

different result. Thus, in case of respondent Knox it is strongly urged that in view of the conditional nature of his remainder interest he held the securities only from the date when his interest became indefeasible and the securities were distributed to him, since one cannot be deemed to have held or acquired property which he might never obtain. But unlike the situation in *Helvering* v. *Hallock,* 309 U. S. 106, we are not concerned here with the question as to when the transfers took effect for purposes of the estate tax. As we indicated in *Maguire* v. *Commissioner, supra,* we are dealing only with a point of reference and a standard of value for determination of gains or losses realized on subsequent sales of property acquired by bequest, devise, or inheritance. For that purpose distinctions between vested and contingent remainders or between absolute and conditional property interests have no relevancy. Each remainderman has become the taxpayer because he has obtained possession and control of the property and has sold it. While the property is held in trust, the vested remainderman has no more rights of possession and control than the contingent remainderman. Yet each has acquired a property interest. The statutory provisions here in question come into play when that interest later ripens into full ownership and a sale is made. Hence the value of the property at the time when the taxpayer first acquires an interest in it has relevance to a subsequent determination of the gains or losses. As we remarked in *Maguire* v. *Commissioner, supra,* the residuary legatee in *Brewster* v. *Gage,* 280 U. S. 327, was held to have acquired his interest at date of death though at that time it was not absolute. To be sure, in these cases the interest of the remaindermen in the property at the earlier time was limited by the very terms of the bequest. But the tax here in question is not on their remainder interests; it is on gains realized by them as owners of that property. Hence, to carry into that computation the earlier value of the property is not to tax them on values which they never received. It merely provides a rule of thumb in alleviation of a tax which would be computed by reference to the entire amount of the original inheritance were it to be based on cost to the taxpayer.

Reversed.

The Chief Justice and Mr. Justice Roberts think the judgments should be affirmed for the reasons stated by the court below, 112 F. (2d) 530.